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No. 59573-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

CYNTHIA CRISAUNDRA BOSS,

Appellant.

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FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 AUG 28 PM 4:50

ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable James D. Cayce

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding the lawfulness of the order of custody was not an element of the offense of custodial interference in the first degree.

2. The trial court erred in failing to instruct the jury in the to-convict instruction that it must determine beyond a reasonable doubt whether the custody order was lawful.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under Washington law, all of the elements of the charged offense must be included in the to-convict instruction. In proving the offense of child interference in the first degree, the elements included the lawfulness of the court order regarding the party who had legal custody of the child. Here, the to-convict instruction omitted the element of the lawfulness of the custody order. Did the trial court err in omitting this element requiring reversal of Ms. Boss's conviction?

2. Whether the lawfulness of the court order placing the child with Child Protective Services and Ms. Boss's knowledge of the lawfulness of the order were elements of the offense of child interference in the first degree?

### C. STATEMENT OF THE CASE

Cynthia Boss is the mother of O.J.B-P. 2/7/07RP 106. In May 2006 O.J.B-P. was four months of age. 2/7/07RP 107. Because of an alleged fear of imminent harm to the child by Ms. Boss and the child's father, on May 11, 2006, Child Protective Services (CPS) obtained from the superior court an order taking the child from the parent's custody and placing the child in shelter care, and an order prohibiting contact between Ms. Boss, the child's father, and the child. 2/7/07RP 104-05. The next day at the shelter care hearing, the court issued an order approving CPS custody. 108-09. Attempts by CPS were made to obtain custody of O.J.B-P. without success. The child was finally located in Houston, Texas in Ms. Boss's custody. 2/7/07RP 129; 2/8/07RP 69. The child was returned to Washington and Ms. Boss was charged with custodial interference in the first degree. CP 1; 2/7/07RP 130.

During the State's case-in-chief the prosecutor moved the court to take judicial notice of the prior court orders giving custody of the child to CPS. 2/8/07RP 2. Ms. Boss agreed that the court could take judicial notice of the orders, but contended the lawfulness of the orders was an element of the offense which the jury must find beyond a reasonable doubt. 2/8/07RP 3-4. The

court disagreed, ruling the determination of the lawfulness of the custody order was a legal determination to be made by the court:

It is a legal determination that I believe always is made by the Court, it is no different that other to convict, like, drugs where we instruct [the jury] specifically that a specific drug is not a lawful drug, or protection order violations, things like that, where it is the judge that makes the legal determination and does instruct the jury.

2/8/07RP 4. The court subsequently instructed the jury that CPS had lawful custody of the child. CP 43. Ms. Boss was convicted as charged. CP 53.

#### D. ARGUMENT

THE LAWFULNESS OF THE CUSTODY ORDER  
WAS AN ELEMENT OF THE OFFENSE WHICH THE  
JURY WAS REQUIRED TO FIND BEYOND A  
REASONABLE DOUBT

1. All of the elements of the offense are required to be in the "to-convict" instruction. Under the Fourteenth Amendment to the United States Constitution, the State is required to prove each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The court's instructions to the jury must clearly set forth the elements of the crime charged. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *State v. Eastmond*, 129

Wn.2d 497, 502, 919 P.2d 577 (1996). In Washington, all of the elements of the crime must be contained in the “to-convict” instruction. *State v. DeRyke*, 149 Wn.2d 906, 911, 73 P.3d 1000 (2003); *State v. Oster*, 147 Wn.2d 141, 147, 52 P.3d 26 (2002); *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). The rationale behind the rule is that “[t]he jury has a right to regard the ‘to-convict’ instruction as a complete statement of the law and should not be required to search other instructions in order to add elements necessary for conviction.” *Oster*, 147 Wn.2d at 147.

2. The lawfulness of the custody order was an element of the offense which was required to be included in the “to-convict” instruction. “The elements of a crime are those facts ‘that the prosecution must prove to sustain a conviction.’” *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005), quoting *Black’s Law Dictionary* 559 (8<sup>th</sup> ed. 2004). In determining the elements of an offense, “[i]t is proper to first look to the statute to determine the elements of the crime.” *Miller*, 156 Wn.2d at 23.

As charged in the amended information, custodial interference in the first degree requires:



(1) A relative of a child under the age of eighteen . . . is guilty of custodial interference in the first degree if, with the intent to deny access to the child . . . , the relative takes, entices, retains, detains, or conceals the child . . . from a parent, guardian institution, agency, or other person having a lawful right to physical custody of such person and:

(a) Intends to hold the child . . . permanently or for a protracted period;

CP 1; 2/1/97RP 5; RCW 9A.40.060(1)(a) (emphasis added). RCW 9A.40.060(1)(a) is clear on its face thus this Court may not look to intrinsic evidence to determine if the lawfulness of the order of custody is an element of the offense. *Miller*, 156 Wn.2d at 28, citing *Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002).

The elements of the offense of custodial interference in the first degree are (1) a relative of a child, (2) with intent to deny access to the child, (3) takes the child, (4) from someone who has legal custody, (5) and intends to permanently or for a protracted period hold the child. Thus, whether the person from who the child is taken has lawful custody of that child is an element of the offense.

Helpful in this analysis is the decision of the Alaska Court of Appeals in *Cornwall v. State* where the Court was called upon to

determine the elements of an analogous statute to the one at issue here. 915 P.2d 640 (Alaska App.1996). In *Cornwall*, the state sought protective custody of a thirteen-year-old child based upon allegations of sexual abuse by the child's stepfather. The mother fled with the child and hid from state authorities. Prior to fleeing, the mother sought the advice of an attorney who advised her that the state had not lawfully obtained custody of the child. At the time the state authorities had not yet obtained a court order transferring custody of the child to the state. The state later obtained an order placing custody of the child with the state. The mother was subsequently arrested in Michigan, returned to Alaska, and charged with among other offenses, the crime of first degree custodial interference. The mother argued she could not be convicted of the offense because at the time she fled the state had not obtained lawful custody and the orders were not lawful because she was never given notice. She also sought to admit the testimony of the attorney.

The Alaska Court found that the elements of first degree custodial interference were, the taking of the child by the mother, with knowledge she had no lawful right to keep the child, and she intended to keep the child for a protracted period of time. *Cornwall*,

915 P.2d 648, *citing Strother v. State*, 891 P.2d 214, 223 (Alaska App. 1995).<sup>1</sup> As a consequence, the Court ruled the attorney's testimony was relevant to whether the mother had no legal right to keep the child from the state.

Thus, if [the mother] honestly believed even mistakenly that there was no legal impediment to her taking [the child] and hiding [the child] from the authorities, then [the mother] did not act with the culpable mental state required for the crime of custodial interference.

*Cornwall*, 915 P.2d at 648.

Alaska's statute is substantially similar to Washington's in that both statutes have as elements the taking of the child, with knowledge that the parent does not have legal custody, with the intent to hold the child for a protracted period of time. Given this similarity and the decision in *Cornwall* which is persuasive authority, it was not merely the fact of the lawfulness of the custody order that was an element of the offense, but also the knowledge by the parent of the lawfulness of the custody order. As a consequence, whether Ms. Boss had knowledge of the lawful order of custody by CPS was an element of the offense of custodial

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<sup>1</sup> Custodial interference under AS 11.41.330(a) occurs when a parent or other relative of a child commits the crime of custodial interference if knowing that [he or she] has no legal right to do so, the defendant takes, entices, or keeps that child ... from a lawful custodian and the defendant performs this act with intent to hold the child ... for a protracted period.

interference which was required to be decided by the jury as well as whether the order was lawful in the first place.

The court's failure to instruct the jury regarding the lawfulness of the court order placing custody of the child with CPS and Ms. Boss's knowledge of that lawfulness in the to-convict instruction was error.

3. Ms. Boss is entitled to reversal of her conviction as the trial court failed to instruct the jury on all of the elements of the offense. A conviction will not be reversed where the to-convict omits an element as long as the jury is instructed on all of the elements of the offense. *DeRyke*, 149 Wn.2d at 912. Where the jury is not so instructed, the defendant is entitled to automatic reversal:

Deryke would be eligible for automatic reversal only if the trial court failed to instruct the jurors on all the elements. Because instruction 12 included the elements of attempt and instruction 10 defined the crime allegedly attempted, he is not entitled to an automatic reversal.

*Id.*

Here, unlike *DeRyke* where the elements omitted from the to-convict could be found elsewhere in the jury instructions, here the jury was never instructed that it must determine the lawfulness

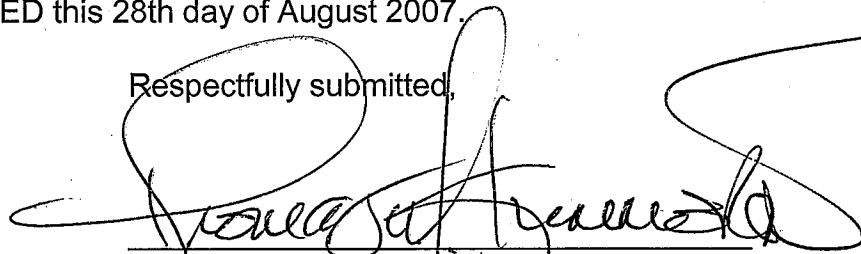
of the custody order and whether Ms. Boss was aware of that order. Accordingly, Ms. Boss is entitled to automatic reversal and remand for a new trial.

E. CONCLUSION

For the reasons stated Ms. Boss submits this Court must reverse her conviction for the trial court's failure to include all of the elements of first degree custodial interference in the to-convict instruction.

DATED this 28th day of August 2007.

Respectfully submitted,

A large, stylized handwritten signature in black ink, likely belonging to Thomas M. Kummerow, is written over the typed name and extends across the signature line.

THOMAS M. KUMMEROW (WSBA 21518)  
Washington Appellate Project – 91052  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

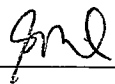
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| STATE OF WASHINGTON, | ) |               |
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| Respondent,          | ) | NO. 59573-3-I |
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| v.                   | ) |               |
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| CYNTHIA BOSS,        | ) |               |
|                      | ) |               |
| Appellant.           | ) |               |

**CERTIFICATE OF SERVICE**

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 28<sup>TH</sup> DAY OF AUGUST, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

|  |                   |                                     |
|--|-------------------|-------------------------------------|
| [X] KING COUNTY PROSECUTING ATTORNEY<br>APPELLATE UNIT<br>KING COUNTY COURTHOUSE<br>516 THIRD AVENUE, W-554<br>SEATTLE, WA 98104 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] CYNTHIA BOSS<br>7540 MLK WAY S, APT 10<br>SEATTLE, WA 98118  | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 28<sup>TH</sup> DAY OF AUGUST, 2007.

X \_\_\_\_\_ 

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